

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 18-CR-00684(ENV)  
:  
:  
-against- : United States Courthouse  
:  
:  
:  
February 18, 2020  
10:00 a.m.  
ELGIN BRACK, :  
:  
Defendant. :  
- - - - - X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE ERIC N. VITALIANO  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: RICHARD P. DONOGHUE, ESQ.  
United States Attorney  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201  
  
BY: PHILIP SELDEN, ESQ.  
JONATHAN SIEGEL, ESQ.  
JONATHAN LAX, ESQ.  
Assistant United States Attorneys

For the Defendant: LAW OFFICES OF JOEL M. STEIN, ESQ.  
30 Wall Street  
8th Floor  
New York, New York 10005

BY: JOEL STEIN, ESQ.

LAW OFFICES OF GARY A. FARRELL  
305 Broadway  
Suite 1400  
New York, NY 10007

BY: GARY A. FARRELL, ESQ.

*Proceedings*

2

1 A P P E A R A N C E S: (Continued.)

2 Court Reporter: DENISE PARISI, RPR, CRR  
3 Official Court Reporter  
4 United States Courthouse  
5 225 Cadman Plaza East  
6 Brooklyn, New York 11201  
7 Telephone: (718) 613-2605  
8 E-mail: DeniseParisi72@gmail.com

6 Proceedings recorded by computerized stenography. Transcript  
7 produced by Computer-aided Transcription.

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9 (In open court.)

10 THE COURTROOM DEPUTY: All rise. Court is now open.  
11 The Honorable Eric N. Vitaliano presiding. Case on the  
12 calendar is USA versus Elgin Brack, case number 18-CR-684 on  
13 for a status conference and pretrial conference.

14 Would the attorneys please note their appearance  
15 beginning with Government.

16 MR. SELDEN: Good morning, Your Honor.

17 On behalf of the United States Assistant United  
18 States Attorney Phil Selden. Your Honor, I'm joined at the  
19 lectern by Assistant United States Attorney Jonathan Siegel  
20 and Assistant United States Attorney Jonathan Lax.

21 MR. SIEGEL: Good morning, Your Honor.

22 MR. LAX: Good morning, Your Honor.

23 THE COURT: Good morning. Too many Jonathan's.

24 MR. STEIN: Good morning, Your Honor.

25 Joel Stein for Elgin Brack.

*Proceedings*

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1 THE COURT: Good morning, Mr. Stein.

2 MR. FARRELL: Good morning, Your Honor.

3 Gary Farrell, likewise, for Elgin Brack.

4 THE COURT: Good morning, Mr. Farrell.

5 THE COURTROOM DEPUTY: All parties are present,

6 including defendant.

7 THE COURT: Good morning, Mr. Brack.

8 THE DEFENDANT: Good morning.

9 THE COURT: All right. I guess you would like to  
10 eliminate so much I guess we've got more, so, Mr. Selden, why  
11 don't you try to catch us up to where we think we are at.

12 MR. SELDEN: Thank you, Your Honor. Just with  
13 regard to a few brief housekeeping matters, Your Honor, the  
14 Government anticipates providing 3500 Giglio materials on  
15 Monday, the 24th a week in advance of trial previously  
16 consistent with the agreed-upon deadlines. The Government  
17 would make a request of Mr. Brack to similarly provide, if  
18 there is going to be, materials that he plans to rely on  
19 during the pendency of the case by that Monday as well; and  
20 just as a housekeeping matter, we plan to, and have spoken  
21 with Mr. Stein, exchange those materials via messenger, so we  
22 don't anticipate any issues with that.

23 THE COURT: Wonderful.

24 MR. SELDEN: Your Honor, consistent with the 3500  
25 and Giglio materials, we also would ask, and the Government

1 plans to provide a witness list on the 24th, a week in advance  
2 of trial, we would ask for a similar witness list from  
3 Mr. Brack of proposed witnesses.

4 Consistent with that, we also would ask --  
5 Mr. Brack, during the course of his motions in limine, made  
6 reference to a Wells Fargo financial document, and I believe  
7 there's going to be some discussion today of his financial  
8 motive and/or evidence that the defendant wish to put before  
9 the jury. Unfortunately, to date, we haven't been able to  
10 resolve obtaining those documents in an un-redacted format,  
11 and so we would ask now on the record whether or not the  
12 defense would be willing to provide that Wells Fargo document  
13 as well as the backup documents, the documents from the months  
14 preceding that one particular month to the Government in an  
15 un-redacted format.

16 MR. STEIN: Judge, we did discuss this earlier, as  
17 well as the previous submissions, so this is what I proposed,  
18 I don't know whether this is going to be agreeable or not, so  
19 I was sent through a third party bank statements from  
20 Mr. Brack's account at Wells Fargo, so the relevance of it is  
21 limited. This isn't an exploration of his finances. It's  
22 limited to a finite point, which is that on the day he was  
23 arrested, 11/26/2018 -- I don't remember the exact amount --  
24 he had 2,000 and something dollars in his account.

25 MR. FARRELL: More than that. 4,347.

*Proceedings*

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1 MR. STEIN: That's not the --

2 MR. FARRELL: Yes, it is.

3 MR. STEIN: Okay.

4 THE COURT: I remember the 4,000 number.

5 MR. FARRELL: Yes, correct, Judge. Your memory is  
6 correct.

7 MR. STEIN: Mr. Farrell is correct.

8 The point of it is we limited it to what was in his  
9 bank account on that day, the day of his arrest, relevant  
10 towards motive. I don't know why they would need to see all  
11 of the bank statements from all of the periods of time that  
12 they were provided to me. I don't see why that's something  
13 they're entitled to have. This is all related to a receipt  
14 that was found -- that was seized from Mr. Brack when he was  
15 arrested. It's a deposit slip, or what's printed out from an  
16 ATM machine, it looks like to me, which had about \$6,000 in  
17 the account at that time, and that was on October 31st. So  
18 this all started because I wanted to be able to introduce the  
19 receipt which was seized from him at that time. They can  
20 argue that it doesn't show that much because it's October 31st  
21 and not November 26th, so I have since then supplemented it by  
22 giving them a redacted bank statement for November 26th  
23 showing the \$4,000 and change. I've told the Government that  
24 we would be prepared to send them from that particular page in  
25 the bank statement un-redacted -- that page which would show

1 the time period from sometime in November up until  
2 November 26th, so I'm not sure what purpose it would serve for  
3 them to have his bank statements from all these other months  
4 that were provided to me by a third party. I didn't get that  
5 from the bank, but I have no reason to dispute them. The  
6 account number -- the account number on the bank statements,  
7 the last four digits of it, corresponds to the account number  
8 for the ATM receipt that I was talking about before which  
9 showed the balance on October 31st, but the relevant period --  
10 the relevant date is November 26th, which, as I said, shows  
11 the balance of 4,000 and change, so I don't see why they need  
12 to see all these other documents. I don't know whether  
13 they're questioning the authenticity of what I provided to  
14 them even though it's redacted or what. It has the last four  
15 digits of the bank account at the top of the page.

16 THE COURT: Mr. Selden.

17 MR. SELDEN: Thank you, Your Honor.

18 Your Honor, putting aside the authenticity and the  
19 business certification, if Mr. Brack plans to introduce motive  
20 or lack thereof through his financial status at the time of  
21 the alleged crimes, we think that having the backup  
22 documents -- not years and years of materials, but simply in  
23 the months prior -- would be helpful for context for the jury,  
24 and without having access to documents that it sounds as if,  
25 pursuant to a reciprocal request under Rule 16, that Mr. Stein

1 has in his possession, custody, and control. If the  
2 Government was in possession of similar documents, we would  
3 have an obligation to turn them over to Mr. Stein, and it  
4 sounds like he's saying that he does have those documents, so  
5 we would simply ask to review those documents. If motive is,  
6 in fact, going to be placed before the jury, we would like to  
7 be able to understand the context of that motive beyond just  
8 one financial number at the end of a redacted document.

9 MR. STEIN: Judge, actually, that's not an accurate  
10 recitation of the reciprocal discovery obligation for the  
11 defendant. It's much narrower than it is for the Government.  
12 The Government has to produce whatever they have that's  
13 outlined in the rule. For the defendant, it's narrower, and I  
14 believe somewhere in my papers I cited this when we went back  
15 and forth about this. It's limited to what we plan on  
16 introducing in our case in chief, so this is what we plan on  
17 introducing as part of our case in chief, not all these other  
18 bank statements for irrelevant periods of time.

19 THE COURT: I think, contextually, there seems to be  
20 an issue, I think in fairness, Mr. Stein, of whether this is  
21 just despite or whether over the couple months prior it's a  
22 fairly consistent source of income. So we may keep saying,  
23 well, putting aside authenticity and certification, except  
24 that we really can't, and if that foundation has to be laid  
25 for the introduction of the document, the documents, not what

*Proceedings*

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1 somebody has provided over the transom, or however you got it.

2 MR. STEIN: They were e-mailed to me, Judge.

3 THE COURT: E-mailed.

4 Particularly, you know, in this electronic age, you  
5 can't believe your own eyes.

6 MR. STEIN: All I can do is repeat, Judge, it has a  
7 correct bank account number.

8 THE COURT: Yeah, okay. And with a statement from  
9 the bank, it's not authentic. It's a piece of paper that has  
10 a bank account number on it that was emailed.

11 MR. STEIN: Okay, Judge.

12 THE COURT: So if you plan to do that, then couple  
13 of months prior would be relevant for context. The object is  
14 that he didn't need it then, he's not going to need it next  
15 week or the month after because he's had it for a long time.  
16 To the extent that one buys the argument that people with  
17 money don't commit robberies --

18 MR. STEIN: That's the argument. Thank you.

19 THE COURT: -- that's an interesting --

20 MR. STEIN: They can say whatever they want about  
21 it, but that's --

22 THE COURT: -- it's an interesting argument. It  
23 certainly isn't resident with me, but it might be resident  
24 with 12 folks over there, I don't know.

25 MR. STEIN: Yes.



*Proceedings*

9

1 THE COURT: Keep going on somebody's list.

2 MR. SELDEN: Thank you, Your Honor.

3 Your Honor, we --

4 THE COURT: I don't whose list, but as long as we  
5 keep going.

6 MR. SELDEN: Of course, Your Honor.

7 THE COURT: We will get to the end one way or  
8 another.

9 MR. STEIN: We have a long list.

10 MR. SELDEN: We anticipate as much from Mr. Stein.

11 This morning the Government received from  
12 Mr. Farrell a reference to a potential cell site expert on  
13 behalf of the defense. We are now approximately two weeks  
14 before trial and the Government had previously provided our  
15 expert notice in May of 2019 with a request for any expert  
16 information by the defense on this topic by May 30th of 2019.  
17 We would simply ask, it sounds as if the defense does not plan  
18 to call that expert, but if, in fact, they are planning to  
19 call an expert, we would ask that they provide us with expert  
20 notice as soon as possible.

21 THE COURT: I assume that they did do that.

22 MR. FARRELL: That's a fair request, Judge, of  
23 course, but we retained the expert solely to help us with  
24 cross-examination, and we are not going to call him.

25 THE COURT: Mr. Selden is just protecting himself in

1 the case all of a sudden sometime around midnight on Saturday,  
2 it strikes you that maybe you should.

3 MR. FARRELL: Right. That's true and fair, Judge.  
4 I understand.

5 THE COURT: Okay. So that's covered.

6 MR. SELDEN: Continuing on the Government's requests  
7 of the defense.

8 On January 31st at ECF 129, the Government had  
9 provided preliminary jury instructions to the defense. We  
10 would simply inquire through the Court when -- if the  
11 defendant plans to submit his proposed jury instructions, if  
12 it's possible to do that in advance of trial so that we are  
13 not in the throws of litigation.

14 THE COURT: Our rules actually require it, as I  
15 recollect them.

16 MR. SELDEN: I believe that's correct, Your Honor,  
17 but we wanted to see on the record when the defense plans to  
18 provide their proposed instructions.

19 THE COURT: In the real world, it is, for the most  
20 part -- I don't know how Mr. Stein plans to proceed, and  
21 Mr. Farrell -- is that there may be a couple that they may  
22 propose, but for the most part, everybody relies on the  
23 Government's overall presentation.

24 MR. SELDEN: Of course.

25 THE COURT: And then we see the charges that they

1 don't like.

2 I assume, Mr. Stein, at some point prior to trial we  
3 will see your version of things that made up the things you  
4 don't like that the Government has proposed, or things that  
5 the Government hasn't proposed at all that you want.

6 MR. STEIN: That will be done, Judge. You will  
7 forgive me, I didn't know -- I thought you were going to set a  
8 schedule for it.

9 THE COURT: No. I think it's sort of set out in the  
10 rules, but, you know, the sooner the better because  
11 Mr. LoMonaco would appreciate that as well.

12 MR. STEIN: I'm sure he will. I know he's been  
13 bored recently.

14 MR. SELDEN: Your Honor, continuing on the  
15 Government's discussions of some housekeeping matters,  
16 pursuant to Rule 12.1, the Government in ECF 139 had made a  
17 request for alibi notice. We understand that Mr. Stein does  
18 not need to respond back to that request until February 23rd,  
19 but we did just want to put on the record that request.

20 In addition, Your Honor, the Government wanted to  
21 address Mr. Stein and Mr. Elgin Brack regarding the eighteenth  
22 and nineteenth discovery productions that I believe were  
23 addressed at last week's -- or, I apologize, at the last  
24 status conference. It's come to our attention that these  
25 productions were reproduced to Elgin Brack after his refusal

1 to accept them in a hardcopy -- that, meaning through an  
2 actual portable hard drive version, and that they were  
3 reproduced to Mr. Brack, unfortunately, through a flash drive,  
4 and the MDC has indicated that they will not accept a flash  
5 drive and so we have endeavored and will be sending out a  
6 reproduction of the reproduction again today.

7 For the record, and so things are clear, Mr. Stein  
8 has indicated that Mr. Farrell and Mr. Stein are both in  
9 possession of all 20 discovery productions, so just so that  
10 the record is clear, defense counsel for Elgin Brack have all  
11 the defendant's discovery productions to this date.

12 THE DEFENDANT: Can I speak on that?

13 THE COURT: Sure.

14 THE DEFENDANT: Just like I told my lawyer, I would  
15 like CDs. As far as my lawyer having 18, 19, this is my first  
16 time hearing about 20, but they are busy, they have other  
17 clients, so they can't, like, come every day to show me piece  
18 by piece, so I would just like CDs of 18, 19 and 20, please,  
19 and I didn't refuse nothing, but too much going on to argue.

20 THE COURT: You will get discovery in the format  
21 that the Government provides it.

22 MR. SELDEN: Your Honor --

23 THE COURT: If we can accommodate any request, we  
24 will accommodate them, otherwise you will make due, Mr. Brack.

25 MR. SELDEN: As always, we appreciate Mr. Brack's

1 involvement in the matter, but unfortunately CDs with the  
2 subject matter would not be feasible for the MDC, which is why  
3 the portable hard drives that have been previously produced to  
4 him will be the format they accept.

5 Your Honor, moving on to sort of housekeeping  
6 matters, we do want to note for the record and would ask the  
7 Court, and are not suggesting that the Court be involved, but  
8 that a plea offer in this case was, in fact, extended to  
9 Mr. Brack on May 29, 2019. It expired on June 13, 2019. We  
10 just wanted to confirm on the record that that plea offer,  
11 without getting into the substance of it, had been, in fact,  
12 articulated to Mr. Brack by counsel.

13 MR. STEIN: Yes, Judge, I presented to him the  
14 proposed written plea agreement back in late May. I don't  
15 remember the exact date.

16 THE COURT: And the fact that we are here is an  
17 indication that it was declined.

18 MR. STEIN: Correct.

19 THE DEFENDANT: Yeah.

20 MR. SELDEN: Your Honor, before turning over the  
21 Government's discussions to Mr. Siegel on the Government's  
22 additional matters, we did want to address one additional  
23 request, and that was for accommodations for the first victim  
24 that the Government anticipates calling in the Government's  
25 case in chief. We want to make sure -- and Mr. Stein, we

1 know, is a zealous advocate, but we think with regards to this  
2 one matter, we might have been missing each other with regards  
3 to what the Government is proposing. Specifically, the  
4 Government is not suggesting that we plan to lead the first  
5 victim to, for example, an in-court identification by pointing  
6 to the defendant or by intimating that the victim should do  
7 so, but instead -- by way of example, the victim struggles at  
8 times and has to utilize a notepad. One example would be if  
9 the victim is asked his relative age, if the victim is asked  
10 his relative age, if the victim writes on the notepad a  
11 number, the ability for Government counsel to be able to  
12 utilize a leading question -- for example, is it correct that  
13 your age is approximately 50, the number you are writing on  
14 the note pad, versus the in-court identification, which the  
15 Government does not plan to utilize. The ability to use the  
16 notepad and to be closer to the victim who, for the record,  
17 suffers from brain damage, we believe is, pursuant to the  
18 Court's discretion, something that's appropriate in this case.

19 THE COURT: Mr. Stein?

20 MR. STEIN: Judge, I don't think we have any quarrel  
21 about that. The nub, of course, is the courtroom  
22 identification, which it's not limited to just that particular  
23 witness --

24 THE COURT: Yeah.

25 MR. STEIN: -- but every witness they plan on

*Proceedings*

15

1 calling from --

2 THE COURT: We will get to that general -- yes, but  
3 this is just limited to accommodating physical accommodations  
4 for that particular --

5 MR. STEIN: There's no problem. I don't want to be  
6 in a situation where when it comes to if you are going to  
7 allow a courtroom verification where someone from the  
8 Government is going to say --

9 THE COURT: Isn't that the guy?

10 MR. STEIN: -- do you see the guy in the courtroom  
11 sitting over there that shot you?

12 THE COURT: Exactly. I think Mr. Selden is acutely  
13 aware of that as well.

14 MR. SELDEN: Yes, Your Honor.

15 Your Honor, I'm now going to turn over some of  
16 today's discussions to Mr. Siegel.

17 Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Selden.

19 Mr. Siegel.

20 MR. SIEGEL: Just to continue on a housekeeping  
21 matter before we get into the actual meat of the motions in  
22 limine, in order to try and make the trial more efficient and  
23 less long for the jury, I think we've agreed in principle on a  
24 number of stipulations. That includes --

25 THE COURT: I hope you are as effective as you were

1 in your last trial in streamlining it.

2 MR. SIEGEL: That's always what I'm aiming for, Your  
3 Honor.

4 So we have agreed on stipulations for some of the  
5 LPR data; for DNA swabs that were taken from the defendant and  
6 from the firearm that was recovered; some of the surveillance  
7 video from inside and outside the stores; a test fire that was  
8 done from the seized firearm. I also understand that we've  
9 agreed on one of the issues in the motion in limine, the  
10 surveillance video from the gun store. Right before this  
11 conference, I spoke with Mr. Stein, and I think we are agreed  
12 on a stipulation that that video would be admissible as video  
13 of Elgin Brack from a certain date in a certain place in a  
14 store with no reference to the fact that that is a gun store  
15 or that he was buying a gun. My understanding of why  
16 Mr. Stein is doing that is obviously to keep out the evidence  
17 of the fact that he was buying a gun, which the Government is  
18 willing to agree to in order to smooth the way of that  
19 surveillance video into evidence.

20 MR. STEIN: Judge, can I just interject something?

21 I'm not sure what the reference is to about a  
22 stipulation concerning the DNA on the gun. I'm not sure --

23 THE COURT: On the swab, I think he said.

24 MR. SIEGEL: Just the swab. That Item Number 3 on  
25 Voucher 6,011 is a swab that was taken of the firearm at Item



1 Number 1 on Voucher 7012.

2 THE COURT: Again, I compliment both Mr. Stein and  
3 Mr. Siegel on a sound accommodation of that surveillance video  
4 from North Carolina.

5 MR. SIEGEL: So at that point, unless there's  
6 additional housekeeping issues, we can get into the meat of  
7 the motion in limine.

8 THE COURT: And that's on Mr. Stein's dime, I  
9 assume.

10 MR. STEIN: Yes, Judge.

11 Well, the most important thing from my perspective  
12 is the in-court identifications. So this goes back to early  
13 October when we filed a motion to exclude the in-court  
14 identification, and I probably don't need to remind you, but  
15 at this point, 15 months have passed since November 26th.

16 THE COURT: My recollection was that at that point,  
17 the Government did not have a then current intent to offer  
18 in-court identification.

19 MR. STEIN: Well, actually, they never said that  
20 until they filed a notice last week, which I objected to.

21 THE COURT: I understand that, but the impression I  
22 had gotten -- my point, Mr. Stein, was the impression I had  
23 gotten last fall was that they did not have an intent at that  
24 time to offer in-court identification.

25 MR. STEIN: Judge, actually, I'm sorry to be

*Proceedings*

18

1 argumentative about it -- actually, I'm not sorry, but I think  
2 they didn't say what their intent was. They --

3 THE COURT: I said that's my impression.

4 MR. STEIN: -- didn't respond, Judge.

5 THE COURT: My impression of what I heard in open  
6 court was that they didn't -- that was their intent at the  
7 time.

8 MR. STEIN: Be that as it may, Judge --

9 THE COURT: I agree. Be that as it may. If I can  
10 speed it up a bit, there's nothing before me at the moment  
11 that I recall reviewing that indicate -- what's obvious?  
12 What's obvious is that the Government wouldn't be proposing to  
13 do that unless they were confident that the witnesses are  
14 going to pick Mr. Brack out, but I see nothing in the papers  
15 so far to tell me on what that confidence is based on, which  
16 is the inquiry you make as to whether or not there's a valid  
17 basis to make an in-court identification.

18 MR. SIEGEL: So, Your Honor, maybe it would make  
19 sense if we laid out that basis and then --

20 THE COURT: -- and then let Mr. Stein respond to it.

21 MR. SIEGEL: -- and then Mr. Stein could respond to  
22 it.

23 The basis -- as we put into our notice, the people  
24 who we anticipate would be able to identify Mr. Brack are the  
25 four cashiers that he robbed at gunpoint, one from each of the

1 stores. Those people stood about two feet away, about as  
2 close as I am standing to the court reporter right now; they  
3 spoke to him before he robbed them when he tried to -- or when  
4 he pretended to check out at the cash register; they then saw  
5 him when he pulled a gun and demanded money from the cash  
6 register; and as was seen in the surveillance video that we  
7 talked about at the suppression hearing, he's wearing a hood,  
8 but the majority of his face is exposed. They couldn't see  
9 his hair, but they could see his face, they could see his  
10 eyes, they could see nose, they could see his chin, they could  
11 see his mouth with a drawstring in it, so based on that  
12 interaction, we understand that those witnesses would be able  
13 to identify him in court.

14 THE COURT: You suppose or you know? If you know,  
15 how do you know unless you have shown them a picture?

16 MR. SIEGEL: We have not shown them a picture.

17 THE COURT: Any picture.

18 MR. SIEGEL: We have not shown them -- we have shown  
19 them the surveillance video from their own store, which they  
20 have, in most cases, had already reviewed. We have --

21 THE COURT: So you don't know for sure that they are  
22 going to identify the defendant.

23 MR. SIEGEL: We do not know for sure. What we know  
24 is that they have said we think that we would be able to  
25 identify the person who robbed us. The reason we don't want

1 to show them a picture and say, Hey, can you recognize this  
2 guy, is that could be extremely suggestive, but they have said  
3 that they believe that they can identify the person who robbed  
4 them, and, in several cases, they have said that since the day  
5 of the robbery in police reports, and that will be in the  
6 3500, so what we anticipate is that we may ask them on the  
7 witness stand, Do you think you would recognize the person if  
8 you saw him today, and, if so, do you see him.

9 MR. STEIN: There's that word "may."

10 Judge, there's a little bit of a Kabuki dance going  
11 on here because way back in September following Second Circuit  
12 law, which I would be glad to read from which doesn't leave  
13 this, in my view, in your discretion, but it's a matter of  
14 law, which is the *Archibald* case -- the *Archibald* case, which  
15 is cited on page 33 of the original papers in this case, which  
16 is ECF Docket 85, and I quoted at length in a footnote, which  
17 is footnote 22 on page 33 of the language from the Second  
18 Circuit denying a petition for rehearing, so if I could -- if  
19 you would indulge me so I can read this so you can see that  
20 this is not something that's just in your discretion, and I  
21 think what's going on here is that basically this is --  
22 forgive the language -- this is a crap shoot. Fifteen months  
23 later, there's been no identification procedure. Back on  
24 September 24th, we made a request for a lineup. They never  
25 answered the request for the lineup even though in their

1 answer to the motions, they said they will respond to the  
2 request for the lineup in their answer to the motions, which  
3 they didn't do, so I didn't create this situation. This is  
4 their case. They have to decide how they are going to best  
5 proceed to try and prove these charges, so instead of  
6 arranging some kind of identification procedure, going back to  
7 September of 2019 when I asked for a lineup and they never  
8 answered, so they now want to have a situation where under the  
9 most suggestive circumstances, they are going to ask witnesses  
10 who haven't seen the perpetrator in 15 months. We can debate  
11 the details of whether or not his face was disguised in some  
12 way. We can agree that, at least to some extent, it was  
13 disguised because, Mr. Siegel is correct, there are some  
14 portions of the face that are hidden to some extent.

15           So if you would indulge me, Judge. So this is  
16 footnote 22 on page 33 of ECF Docket 85. This is the language  
17 from the Second Circuit denying the petition for rehearing,  
18 and you will see in the language, Judge, this isn't  
19 discretion. The order denying the petition for rehearing  
20 stated, quote: "We wish to make it clear in respect to that  
21 portion of our opinion relating to in-court procedures for  
22 identification that special procedures are necessary only  
23 where, one, identification is a contested issue" -- without a  
24 doubt.

25           "Number two, the defendant has moved in a timely

1 manner prior to trial for a lineup." September 24th, 2019, I  
2 have the email. I don't think they would deny that.

3 "Three, despite that defense request, the witness  
4 has not had an opportunity to view a fair out-of-court lineup  
5 prior to his trial testimony for a ruling on the fairness of  
6 the out-of-court lineup has been reserved. Subject to this  
7 modification of the opinion, the petition for rehearing is  
8 denied."

9 So there's no -- nothing within your discretion to  
10 decide this; and this is, under the most suggestive possible  
11 circumstances, they're going to ask a witness from 15 months  
12 ago to look at -- everybody knows who the defendant is in the  
13 courtroom, there's no secret about that -- to make an  
14 identification, and this is not proper. This is the language  
15 of the *Archibald* case, which also relied on a previous  
16 precedent, which I cited in my papers, which is *United States*  
17 *against Brown*, it's on page 33 to 34, that preceded *Archibald*.

18 So they should not be able to create this situation,  
19 do nothing about preserving some kind of reliable  
20 identification procedure, come in here 15 minutes later and  
21 you see the guy who robbed you. To me, this is not  
22 permissible.

23 THE COURT: Mr. Siegel?

24 MR. SIEGEL: So, Your Honor, I don't have  
25 Mr. Stein's brief from last fall in front of me, but I think

1 the *Matthews* case that was also cited in the papers and that  
2 we discussed at length at the last oral argument on the last  
3 round of motions, the *Matthews* case is clear that it is in the  
4 Court's discretion, and even under the language that Mr. Stein  
5 just quoted, it requires a timely request for a lineup.

6           September 2019 was ten months after these robberies  
7 occurred. Ten months is already time for memories to  
8 potentially fade; and as the Government was clear at the last  
9 oral argument, we didn't want to be in a position of creating  
10 potentially additional evidence or potentially evidence one  
11 way or another. What the *Matthews* case makes clear is that  
12 the Court has the discretion because an in-court  
13 identification -- it's a risky proposition for the Government,  
14 and the fact that it is -- the fact that there is a defendant  
15 sitting at counsel table is something that the defendant can  
16 argue at closing, and *Matthews* lists that as a potential  
17 remedy for the issues that Mr. Stein is listing, but it's  
18 quite possible that someone on the stand will say, I can't  
19 recognize him, or I don't see him, or that they identify the  
20 wrong person. If the Government asks the witness to identify  
21 the person who robbed them, those are risks the Government is  
22 taking. If the witness does identify Mr. Brack, Mr. Stein can  
23 make all the arguments to the jury that he has just made here  
24 for why the jury should not take -- should not give that  
25 weight, but at this point, 15 months later, even at the point

1 when he requested a lineup, ten months later, a lineup isn't  
2 appropriate at that point. This isn't a situation where he  
3 requested a lineup the day he was arrested or a week after he  
4 was arrested or a month after he was arrested, and in these  
5 circumstances, the witness should be able to testify to  
6 whether they can recognize someone, if they recognize someone,  
7 and then whatever weight that has is up to the jury.

8 MR. STEIN: Judge, they are not going to put this on  
9 me by saying I didn't ask for a lineup until September 24,  
10 2019. This is their investigation, it's their prosecution,  
11 the robberies take place in the early morning hours on  
12 November 26th, the arrests are later that evening about 12  
13 hours later, and they don't have a witness who can identify  
14 someone from the scenes, so they are not going to put this on  
15 me by saying that we didn't ask for this sooner. They have to  
16 decide how they are going to proceed, and it seems to me  
17 pretty obvious that this is something that they should have  
18 thought of way before September 24, 2019, otherwise, how do  
19 you preserve the integrity of an in-courtroom identification?

20 MR. SIEGEL: Respectfully, that's -- even the  
21 language that Mr. Stein read, that's not what it says. The  
22 language that Mr. Stein read requires a timely request by  
23 defense counsel, so the Government conducted its investigation  
24 as it chose to do. We think --

25 THE COURT: Are you aware of any cases that defines



1 "timely," Mr. Siegel?

2 MR. SIEGEL: I am not, but I think, as *Matthews*  
3 says, it's the Court's discretion as to what would be  
4 appropriate and what is necessary to make sure that any  
5 identification is fair.

6 MR. STEIN: Judge, when they filed this notice,  
7 which I filed yet another set of papers to address, I asked  
8 two remedies, and this is ECF 143, so --

9 THE COURT: This is this last filing, Mr. Stein?

10 MR. STEIN: Actually, I filed something yesterday in  
11 response to the request for special accommodations for the  
12 witness.

13 THE COURT: Yes, I signed that.

14 MR. STEIN: Excuse me?

15 THE COURT: I thought you meant the attire.

16 MR. STEIN: No. I'm just saying, I did file  
17 something else, but it's not relevant to this, so their  
18 notice, their so-called identification notice, is -- speaks in  
19 terms of "may" -- they may do this. Okay? You may do this --  
20 and I don't think that kind of notice is notice of anything.  
21 At this point, they should have some certainty if they had --  
22 they can take this the way they want to -- if they had done  
23 their job by protecting the integrity of a potential  
24 in-courtroom identification by arranging a proper procedure so  
25 that we don't have this particular discussion, so I made two

1 requests: Number one is I asked that their identification  
2 notice that they filed -- ECF 140 is their identification  
3 notice, which is very perfunctory, it just says they may ask  
4 for a courtroom identification.

5 THE COURT: For the record, Mr. Stein, what date is  
6 that?

7 MR. STEIN: Mine or theirs?

8 THE COURT: The 140, what you just referenced.

9 MR. SIEGEL: It's February 11th.

10 THE COURT: February 11th of 2020?

11 MR. STEIN: Right, ECF 140.

12 So I made two requests, one is to strike their  
13 notice because it's insufficient and any eyewitness from the  
14 scene should be precluded from being asked to make an in-court  
15 identification -- I know I never repeat myself -- 15 months  
16 later.

17 Alternatively, Judge, as to each witness from  
18 eyewitness from the store that they expect to call and be  
19 asked to make an identification as to each one of them out of  
20 the presence of the jury, out of the presence of the  
21 defendant, that each one should be -- testify to that person's  
22 independent source of being able to make an identification.  
23 Obviously, the defendant shouldn't be there because if he's  
24 sitting there, that would taint the whole process; and, of  
25 course, this shouldn't be in front of the jury either, so you,

1 as the gatekeeper, can make a threshold determination as to  
2 whether or not this is permissible, which, as I've said, it  
3 isn't, so depending on what each of the four or so witnesses  
4 testifies to about what their ability was to observe  
5 descriptions, distance, whatever the totality of the  
6 circumstances are, so that you can make a proper determination  
7 as to whether or not they can ask for in-court identification.

8 MR. SIEGEL: Your Honor, Mr. Stein is suggesting  
9 that in every case where a witness is going to make an  
10 in-court identification, that a lineup or a similar procedure  
11 is required. That's not the law. The Second Circuit has held  
12 it's not the law. The Court may, in its discretion, require  
13 it, and given that there was no request for a lineup for ten  
14 months after -- until ten months after the crime, in this  
15 case, it's not appropriate. That February 11th date where we  
16 made the notice, that was pursuant to a Court's order, to your  
17 order that we make that notice on February 11th, and the  
18 reason it was "may" instead of "will" is because we don't know  
19 what the witness is going to say at trial. At trial, the  
20 witness may say --

21 THE COURT: You are saying that you are definitely  
22 going to ask.

23 MR. SIEGEL: Yes.

24 THE COURT: I think that's what Mr. Stein was  
25 eluding to.

1           MR. SIEGEL: We are going to ask -- we anticipate  
2 asking --

3           THE COURT: That you somehow know what the answer is  
4 going to be.

5           MR. SIEGEL: We anticipate asking if they would  
6 recognize the person if they saw them today.

7           MR. STEIN: Judge, I just wanted to add one thing to  
8 this.

9           The description, of course, again, not rehashing  
10 about the details of the person's face, but you could see  
11 Mr. Brack's very long dreadlocks, so these people are going to  
12 be asked to look at someone whose hair was obscured by a hood  
13 that was tightly drawn around the outlines of the face, so --  
14 I'm sorry, there's one thing I want to add.

15           Judge, I'm sorry, I want to correct something that I  
16 sent a message to the Government about.

17           Although it's not acceptable that a lawyer makes a  
18 misstatement in a court filing, but I wrote in my page 1 of  
19 ECF 143, I wrote that it was two months since the Court's  
20 order on January 16th to provide identification notice.  
21 Obviously, that was in error because it was about three weeks  
22 or so, but to me, although I shouldn't make that kind of  
23 mistake, it's irrelevant because they should have done this,  
24 as I have been arguing, long ago and not just in response to  
25 the Court's order on January 16th.

1           MR. SIEGEL: We made the notice when we made it  
2 because that's when the Court ordered us to make it.

3           THE COURT: Mr. Stein's point is you could have made  
4 it earlier. Are you saying that there's nothing that required  
5 you to make it earlier, or are you saying that you hadn't made  
6 up your mind until you --

7           MR. SIEGEL: I'm saying there isn't anything that  
8 required us to make that earlier, we hadn't made up our mind,  
9 and I've been corrected by my colleagues, we frankly still  
10 haven't made up our mind. It's something that we are giving  
11 active thought to, it's something that we are going over the  
12 witnesses in prep, but --

13          THE COURT: I think that was Mr. Stein's point  
14 before, that he doesn't really know yet. You haven't  
15 really --

16          MR. SIEGEL: But we don't really know yet, and I  
17 don't know that we will know until that day. I mean, for  
18 purposes of Mr. Stein's motion, I think we can assume that we  
19 are going to do it and we can resolve the issue on that, but  
20 standing here right now, I don't -- I don't know what question  
21 we are going to ask each one of these witnesses. I think it  
22 is a question we may ask.

23          THE COURT: And I suppose to help fill in more of  
24 the spaces, based on what you just said, I assume it's also  
25 theoretically possible that you may ask some but not all of

1 these witnesses that question.

2 MR. SIEGEL: That's right.

3 MR. STEIN: Judge, with all due respect, I don't  
4 know want any witness to be asked the question, whether it's  
5 some or a few. It's none.

6 THE COURT: I hear you, but you also wanted to know  
7 what their plan was, and I thought you were concerned about  
8 not being informed, even at this point, as to whether or not  
9 that was the plan.

10 MR. STEIN: Correct. That's why I moved to strike  
11 the notice as insufficient.

12 Judge, can I just reference also -- again, in ECF  
13 Number 143, footnote 1 on page 1, I cited the rule of criminal  
14 procedure, which is Rule 12(b)4(A), which leaves it to the  
15 Government's discretion, because it used the word "may" --  
16 this is way back at the beginning of the case -- that they may  
17 serve notice of its intent to use specified evidence at trial,  
18 quote: "At the arraignment or as soon afterwards as  
19 practical."

20 Now we can go back and forth again about the Court's  
21 order on January 16th about a request for the lineup back in  
22 September, but the rules of criminal procedure required them  
23 to give some kind of notice at the arraignment or as soon  
24 afterwards as practical. I mean, was I supposed to ask for a  
25 lineup at arraignment?

1 Judge, it's not a very lawyerly word, but I'm  
2 listening to the Government argue about this, but this  
3 shouldn't be something that's such an important issue because  
4 it's no secret that identification is an important part of  
5 this trial. This shouldn't be a crap shoot. They haven't  
6 decided if they are going to ask. If they do ask, they don't  
7 know what the witness is going to say. This is -- I mean --

8 MR. SIEGEL: Your Honor, we've narrowed it down of  
9 all the potential witnesses to four people we may call. Those  
10 four people are all similarly situated with the exact same  
11 basis to identify him, so in terms of narrowing it down so  
12 that we can have the discussion about whether this is  
13 appropriate, as we submit it is, other than actually sitting  
14 here right now and putting the witness on the stand and having  
15 them give their testimony, which I'm not aware of any case  
16 where that's been done, all we can say is that this is what we  
17 intend; these are the four people we may ask it of, nobody  
18 else; and the basis for it is what's shown on the surveillance  
19 video that Mr. Stein has had for months, which is they stood  
20 about two feet away from Elgin Brack, looked him in the eye  
21 and spoke to him.

22 MR. STEIN: Judge -- it would just be repetitive,  
23 Judge. I mean, I just think this is not an acceptable way to  
24 proceed based on the law that I just quoted from and that is  
25 in my papers.

1 THE COURT: We are going to analyze your case in  
2 connection with *Matthews*, which is advanced by the Government  
3 and see where we're at. If there's no further argument on  
4 that, we'll reserve on it and try to sift through it all.

5 Other points?

6 MR. SIEGEL: Just to tick through some of the issues  
7 in the motions in limine, there was back and forth about  
8 Mr. Brack's prior criminal acts and prior arrests and criminal  
9 history. I don't know if we've reached agreement on that, but  
10 the Government doesn't intend to cross him on that unless he  
11 puts his character into evidence or otherwise gives testimony  
12 that would be misleading without that context. So we don't  
13 intend to use it just to attack his general credibility as  
14 felonies are sometimes used, but if he makes comments of "I've  
15 never been in trouble with the law"; "I've never done anything  
16 like this," or if there's any argument that that's not the  
17 kind of person that he is who commits these violent crimes,  
18 then I think evidence that he has been arrested and has  
19 admitted to violent crimes in the past should be admitted.

20 MR. STEIN: I don't think that's going to be an  
21 issue.

22 Judge, can we just go back to something -- I know  
23 Mr. Siegel is going through the in limine, but I wanted to go  
24 back to something that has to do with one of the eyewitnesses.  
25 This is the gentleman who was severely shot.



1 THE COURT: Yes.

2 MR. STEIN: Back in my original filing, ECF 85, I  
3 asked that the victim, the injured witness, that his testimony  
4 and the medical records be excluded because putting aside from  
5 whether or not he can make an in-court identification, whether  
6 or not his testimony is necessary, as opposed to the sympathy  
7 that is undoubtedly going to be generated, because from my  
8 understanding and looking at the medical records, he was very  
9 badly injured, and I assume he's going to be permanently brain  
10 damaged, so the whole point of his testimony, as I understand  
11 it, putting aside the eyewitness aspect of it, it is -- they  
12 want to be able to call him to prove discharge of a firearm,  
13 which is one of the elements of Count Three of the indictment.

14 So I had pointed out five or six different ways that  
15 they can prove discharge in this case, including a video, a  
16 store video surveillance, in which the actual shooting takes  
17 place. So the perpetrator is standing next to this gentleman,  
18 and you could see the gun being fired, they have ballistics  
19 evidence to show that a gun was fired, they have New York City  
20 Police Department officers who responded to the scene of the  
21 injured person. There's a number of different ways.

22 So, again, putting aside whether or not there's  
23 going to be a courtroom identification from this witness,  
24 can -- when this came up, Judge, in your order from  
25 January 16th -- I have to find the tab -- so this is on

1 page 28 of the Court's order, which is ECF Number 122, you  
2 would reserve decision on this, I had moved to preclude  
3 photographic and medical evidence of a witnesses -- of a  
4 victim's injuries suffered during one of the incidents as well  
5 as the testimony of the victim in the event that he cannot  
6 identify.

7 Well, that gets back to the problem of whether or  
8 not he can make an identification. The point is, I don't know  
9 whether he's going to make an identification, they don't know  
10 whether or not he can make an identification, but this is  
11 someone who was grievously injured, and it's unnecessary to be  
12 able to prove the element in Count Three of discharge of a  
13 firearm with all the other evidence they have to show that a  
14 firearm is discharged, including a video of the actual  
15 shooting.

16 MR. SIEGEL: Your Honor, this is an eyewitness who  
17 is going to say, I was working at the Duane Reade, this man  
18 approached me, he demanded money, and then we struggled and I  
19 was shot. That's testimony that comes in in courts all the  
20 time every day in this courthouse and around the country, and  
21 it's not unduly prejudicial for a witness to say I was shot.

22 THE COURT: I think Mr. Stein was referring to more  
23 than that, wasn't he?

24 MR. STEIN: I am, Judge. It's the 403 analysis.

25 THE COURT: And then what happened? You know, what

1 was the nature of the injury itself?

2 MR. STEIN: Judge, I understand he's in a facility,  
3 I don't know whether he's ever going to be discharged from the  
4 facility and he's in very bad shape, so is this really  
5 necessary to prove discharge of a firearm when they have a  
6 number of different ways --

7 THE COURT: Yeah, the sequela of what happened after  
8 he was shot is certainly not necessary.

9 MR. SIEGEL: So let me be clear. We are not going  
10 to ask him: Do you live in a facility? What are your plans  
11 for the rest of your life? How has this affected you? We are  
12 not going to be asking those questions. We are not going to  
13 be showing bloody photographs of him lying on the floor. I  
14 think we've actually made a very serious effort to not bring  
15 in the things that are gory or inflammatory.

16 THE COURT: Inflammatory, yeah.

17 MR. SIEGEL: But it is not inflammatory for a  
18 eyewitness to say, I was robbed, which goes to the robbery  
19 conspiracy and the robbery charge, and I was shot.

20 THE COURT: Yes.

21 MR. STEIN: My point is, Judge, again, whether this  
22 is necessary to prove discharge when they have all these other  
23 ways and avoid the sympathy. I hear what they're saying about  
24 there's going to be no bloody pictures, there were pictures of  
25 the wounds that are awful. I'm talking about --

1           THE COURT: He's going to be here, Mr. Stein. The  
2 principle issue goes back to the one that we spent the most  
3 time on is whether or not he can make the identification.

4           MR. SIEGEL: And I should also be clear that he  
5 doesn't have, like, a piece of his -- he's not visibly missing  
6 any piece of his head. He's going to walk in on his own two  
7 feet and testify. He needs accommodations, as we've said.  
8 That's -- that is the unfortunate consequence of Mr. --

9           THE COURT: That's true of a lot of witnesses who  
10 haven't been shot, so that's not unusual either.

11           MR. SIEGEL: Given that there are cases where, in  
12 fact, the gory photographs are admissible, the fact that we  
13 are not admitting that but we just want the witness himself, I  
14 think this is well within the bounds of what is ordinarily  
15 admitted.

16           MR. STEIN: Judge, I'm just referring to the Court's  
17 order dealing with this particular issue.

18           THE COURT: Right. And it will be resolved,  
19 Mr. Stein.

20           MR. STEIN: Okay. Well, in any event, it's on  
21 page 28 and 29 of the Court's order, so we are back to the in  
22 limine.

23           THE COURT: Mr. Siegel.

24           MR. SIEGEL: On the reverse side of talking about  
25 Mr. Brack's -- any argument of Mr. Brack's good character --

1           THE COURT: I think Mr. Stein has indicated that  
2 that is not an issue.

3           MR. SIEGEL: That's right. The reverse of that is  
4 efforts to talk about Scott Brack's alleged bad character and  
5 Scott Brack's criminal history and Scott Brack's guilty plea.  
6 I think the Government laid it all out in its papers, but --

7           THE COURT: I'm not sure I understand what Mr. Stein  
8 is actually asking for there.

9           MR. STEIN: Several things, Judge. One is that you  
10 take judicial notice of his guilty plea. The record of his  
11 guilty plea was sealed -- I'm not sure why, I can guess -- but  
12 in any event, you can certainly take judicial notice of the  
13 fact that he pleaded guilty to -- I don't even know what he  
14 pleaded guilty to, I can just guess.

15           THE COURT: I don't know why you would want that  
16 because it would -- it would be reading the count that he pled  
17 guilty to.

18           MR. STEIN: Because part of our argument, Judge,  
19 besides the identification is that two other people committed  
20 the robbery, and it's no secret he --

21           THE COURT: He pled guilty to conspiring with Elgin  
22 Brack.

23           MR. STEIN: Correct, Judge, but we are not asking,  
24 obviously, that when -- if you take judicial notice of his  
25 guilty plea that you would take -- you would include that.

1 You would say on such and such a date, Scott Brack pleaded  
2 guilty to -- whatever the count is he pleaded guilty to.

3 THE COURT: And in fairness, the count would be  
4 read. And in that count, he pleads guilty. Not just he pled  
5 guilty, he pled guilty to conspiring with Elgin Brack and  
6 others. That's what you want the jury to hear?

7 MR. STEIN: Of course, not, Judge. Like I said,  
8 what I wanted you to do -- what I'm asking you to do is to  
9 take judicial notice that he pleaded guilty on whatever the  
10 date is to whatever the charge is.

11 THE COURT: To what?

12 MR. STEIN: I don't know what the charge is. It was  
13 sealed.

14 THE COURT: He pled guilty to conspiring to commit  
15 Hobbs Act robbery.

16 MR. STEIN: And he pleaded guilty to conspiracy to  
17 commit Hobbs Act, period.

18 THE COURT: I'm not shortening it at all. That's  
19 what he pled guilty to, not half of what he pled guilty to.

20 MR. STEIN: Well, courts redact things all the time,  
21 as we've been discussing here.

22 THE COURT: The point of it all, I don't quite see  
23 the relevance of it in any event.

24 MR. SIEGEL: I think -- that's the Government's  
25 view. Even aside from making potentially misleading

1 redactions to what he pleaded guilty to, it's not relevant.  
2 The law is clear, the jury instructions are clear. Only one  
3 person is on trial here --

4 THE COURT: -- on trial is what's relevant.

5 MR. STEIN: Well, that's literally a correct  
6 statement, but we are going to be arguing that two other  
7 people committed the crime, one of whom was Scott Brack.

8 MR. SIEGEL: They can argue that. We will also be  
9 arguing that Scott Brack committed this crime. I don't think  
10 that's going to be in dispute.

11 THE COURT: They don't disagree with half of your  
12 proof, Mr. Stein.

13 MR. SIEGEL: Just like you couldn't put into  
14 evidence, "Well, my co-conspirator hasn't pleaded guilty,  
15 therefore, we're all not guilty," the fact that someone has  
16 pleaded guilty is irrelevant to Mr. Brack's -- to Mr. Elgin  
17 Brack's guilt.

18 And it is also, by the way, inadmissible hearsay.  
19 All of it is. So it's irrelevant, it risks infusing the jury,  
20 it's hearsay, and the only thing that Mr. Stein is proposing  
21 to be admitted is, frankly, misleading. To argue that he  
22 pleaded guilty to conspiracy; therefore, you can infer that he  
23 conspired with someone other than Elgin Brack when, in fact,  
24 what he pleaded guilty to is conspiring with Elgin Brack is  
25 misleading to the jury.

*Proceedings*

40

1           MR. STEIN: Judge, a long time ago I raised this  
2 issue. Their indictment says the two of them, the Bracks,  
3 pleaded guilty with others unnamed. So that's their  
4 indictment, that's the language they put that in there, so  
5 that gives us an opportunity to argue exactly what I'm arguing  
6 which is that Scott Brack and another individual --

7           THE COURT: Yeah, but you are dropping out the  
8 "and," though, Mr. Stein.

9           MR. STEIN: Excuse me?

10          THE COURT: You are dropping out the "and." "And  
11 others."

12          MR. STEIN: Right, and others. Actually, I don't  
13 know if that's the --

14          THE COURT: That's where the misleading comes in.

15          MR. STEIN: Well --

16          THE COURT: One of the others is clearly identified  
17 and it's the defendant. You can't use that as evidence that  
18 he pled guilty with others without acknowledging that he pled  
19 guilty of -- one of the others, maybe there are others,  
20 because that's what it was charged, but one of the ones that  
21 is identified as one of the others of the entire conspiracy,  
22 one of the co-conspirators -- two of the co-conspirators are  
23 identified in the count; one is Scott Brack and the other is  
24 Elgin Brack, and that's what he pled guilty to.

25          MR. SIEGEL: Your Honor, I would also add and I



1 think it's pretty clear that part of the defendant's argument  
2 is going to be that there was a third man involved in all of  
3 this. None of that -- even if there was a third man, that  
4 doesn't mean that there wasn't the second man of Elgin Brack.  
5 So this is sort of bleeding into the discussion about person A  
6 and attempts to mislead the jury about person A, but Scott  
7 Brack is not on trial, person A is not on trial. They can  
8 make their defense that Elgin Brack wasn't guilty, but the  
9 fact that other people are also guilty is relevant to his  
10 guilt.

11 MR. STEIN: Judge, I completely disagree with that.  
12 Are they really saying that we cannot argue that Scott Brack  
13 and a third individual -- we don't have to dance around about  
14 this -- who was a driver of the car, who was in there when  
15 everybody was arrested, there's information that's relevant to  
16 his circumstances. So, I mean, are they seriously saying that  
17 we can't argue that the third person in the car, along with  
18 Scott Brack, were the perpetrators of the robbery? I don't  
19 think so.

20 MR. SIEGEL: Maybe I was unclear. If they want to  
21 argue that Scott Brack was involved in this robbery, that's  
22 fine. If they want to argue that Scott Brack was, in fact,  
23 the person in the store who pulled the trigger, I suppose  
24 that's fine. If they want to argue that a third person was  
25 also involved, that's fine. What's misleading to the jury is

1 to bring in evidence that there were three people involved and  
2 only one person is on trial here and therefore for some reason  
3 they should acquit.

4 MR. STEIN: No, I'm saying two people, Judge, not  
5 three people.

6 THE COURT: Yes, but that, Mr. Siegel, is what that  
7 charge is all about at the end. The jury is not to speculate  
8 about why some of the names that you may hear aren't on trial  
9 before them.

10 MR. SIEGEL: Well, and that's an instruction that we  
11 requested --

12 THE COURT: That's a request that's always given and  
13 it will be given. I mean, if they want to talk about the fact  
14 that Scott Brack is not here, if they want to talk about a  
15 third party, I don't know what the good faith basis for that  
16 or how they intend to offer proof about that --

17 MR. SIEGEL: Well, the point I'm making --

18 THE COURT: -- I don't know what's going to be in  
19 the records that will permit you to argue.

20 MR. STEIN: Judge, part of our in limine submission  
21 are recordings from the Bureau of Prisons which arguably  
22 implicate another person, so person A who hasn't been  
23 identified by name in the record, but his nickname is Boogie.  
24 So in some text messages and in some telephone calls that we  
25 provided as exhibits, Boogie is talking with Scott Brack two

1 days before the robbery about what arguably is a plan to  
2 commit a robbery. So...

3 THE COURT: How are they admissible?

4 MR. STEIN: How are the text messages admissible?

5 THE COURT: Yes.

6 MR. STEIN: We cited a residual exception to the  
7 hearsay rule, it's Rule 807 of the Federal Rules of Evidence.  
8 My argument is in there because there's independent evidence  
9 to show that that's -- that the discussions were reliable.  
10 There's the text messages; there's the recordings from the  
11 jail, although it's not -- obviously it's not admissible  
12 evidence; there was a Pretrial Services report about Scott  
13 Brack -- I'm not sure why they produced it in discovery -- but  
14 there are independent bases to believe that the discussions  
15 are of evidentiary value.

16 MR. SIEGEL: I think Mr. Stein may be mixing a  
17 couple different streams of issues or perhaps I'm confused.  
18 There aren't any jail calls with person A as far as I'm aware  
19 of.

20 MR. STEIN: There are not. There's text messages  
21 between Boogie, who is person A, and Scott Brack.

22 MR. SIEGEL: So let's separate those out. The jail  
23 calls are jail calls by the defendant, Elgin Brack, with  
24 someone who is a relative of his, I believe an aunt or a  
25 cousin, and calls between Scott Brack and that person. Those

1 are just clear hearsay and to the extent they are -- they are  
2 just clear hearsay and they don't fall under the residual  
3 exception, especially Elgin Brack's own statements. Both of  
4 those were statements made by, then, the defendants, while  
5 they were in jail and when they knew they were being recorded.  
6 So arguments -- argument of that isn't in any way reliable,  
7 that a defendant can create evidence that they can admit at  
8 trial without testifying by just making a recorded jail call.  
9 There are no cases cited by Mr. Stein where that has been  
10 allowed and that doesn't fall into the logic of the hearsay  
11 exception and it violates the rule that generally if a  
12 defendant wants to get their statements in, they have to  
13 testify. So that's for those calls.

14 For the text messages with who is identified in the  
15 text message chain as Boogie, what those text messages are, to  
16 be clear, is Scott Brack asking to borrow a person's car  
17 because something is going to happen and they say Friday or --  
18 Friday or Saturday is when this thing was going to happen. In  
19 fact, these robberies, the robberies that we are talking about  
20 happened on a Sunday night into Monday morning. So, again,  
21 these text messages, I don't know what the relevance is to  
22 this robbery, but they are just going to mislead and confuse  
23 the jury.

24 MR. STEIN: Judge, the relevance is that he --  
25 person A, Boogie, is planning a robbery with Scott Brack.

1 That's the relevance.

2 MR. SIEGEL: There is nothing --

3 THE DEFENDANT: Can I speak?

4 THE COURT: Not now you can't.

5 MR. STEIN: As I said, Judge, we are going to be  
6 arguing; there's no secret about this that I'm disclosing  
7 today, we have been arguing for some months in our papers that  
8 we are going to be arguing that two other people committed the  
9 robbery, Scott Brack and a third person. I don't mean a third  
10 robber, I mean a third person other than Elgin Brack.

11 MR. SIEGEL: To be clear, these text messages don't  
12 suggest -- don't say anything about a robbery. It's  
13 conversations about did you get the car for either -- there's  
14 discussion about getting a car for today, which was three days  
15 before the robbery, or for Friday and Saturday, which was two  
16 days and one day before the robbery. There's no discussion  
17 about doing anything on the dates of this charged robbery and  
18 there's no discussion about robberies, period. There's  
19 discusses about getting a car.

20 MR. STEIN: Well, everything doesn't have to be in  
21 black and white, Judge. The fact that it wasn't on the exact  
22 date or they didn't use the word robbery or stickup doesn't  
23 mean that there isn't a basis to argue that this is what the  
24 discussion was that was taking place between two other people.  
25 I mean, we see tapes of recordings in drug cases all the time,

1 and unless a prosecutor is really lucky, people don't say  
2 cocaine or heroin, they use all kinds of different codes. So  
3 this isn't really any different.

4 MR. SIEGEL: In those cases where there are wires  
5 that Mr. Stein was referring to, those statements are  
6 admissible as either statements of the defendant or statements  
7 of co-conspirators of the defendant. That doesn't apply where  
8 the defendant is trying to admit statements by other people,  
9 so that doesn't get around that even if these statements are  
10 relevant, even if they are not going to just mislead the jury,  
11 they're still hearsay.

12 MR. STEIN: Judge, can I read from one particular  
13 text message, which is from November 24th, two days before the  
14 robbery, in which Boogie -- the driver of the car, person A --  
15 is saying to Scott Brack: "We said Friday or Saturday, my G."  
16 Which I think G is just a street term of art. "It's going  
17 down this weekend, my G."

18 So it doesn't give a specific date, but it's pretty  
19 clear that in the context that what is -- what they are  
20 referring to from which we can make our argument. It's one  
21 thing to say that this is completely irrelevant, it doesn't  
22 prove anything; they can argue what they want to that this  
23 proves and we will argue what we want to what we think it  
24 proves.

25 THE COURT: And your argument for the hearsay

1 objection again is?

2 MR. STEIN: Well, this was -- I disagree with  
3 Mr. Siegel's statement that we didn't cite any cases in our  
4 papers supporting the application of the residual exception to  
5 the hearsay rule. I cited cases, Judge. There are cases that  
6 support this, including, I think, some reference to phone  
7 conversations. So you have the papers, Judge.

8 THE COURT: I will look at them.

9 Do you want to be heard on that aspect of the  
10 argument, Mr. Siegel?

11 MR. SIEGEL: No, Your Honor. I don't think this  
12 falls into the residual exception for the reasons I already  
13 gave, and I don't think it's relevant, and I think it's just  
14 an attempt to mislead the jury or confuse the jury.

15 THE COURT: I'm trying to remember if you -- there  
16 was one aspect that the Government hadn't submitted papers on;  
17 was this --

18 MR. SIEGEL: This is an issue that came up in Elgin  
19 Brack's reply was the first time we saw these text messages.

20 THE COURT: Right. So you have or have not  
21 submitted anything in writing?

22 MR. SIEGEL: We have not submitted anything in  
23 writing.

24 THE COURT: So you haven't cited a case one way or  
25 the other on this matter?

1           MR. SIEGEL: On this issue, that's right. But for  
2 the issue of text messages between --

3           THE COURT: Whether they fall within the residual  
4 exception to the hearsay rule.

5           MR. SIEGEL: We have not cited cases on that, again,  
6 because it just came up in the reply, but the heart of the  
7 residual exception is that this be something that is otherwise  
8 reliable and --

9           THE COURT: Well, do you want to cite -- by the end  
10 of the day, if you want to submit a letter on that subject,  
11 since it came up -- in effect, it's sur-reply to the reply,  
12 you may.

13           MR. SIEGEL: We will do that, Your Honor.

14           Similar to this, there's questions -- there's the  
15 defendant's efforts to admit evidence of Scott Brack's  
16 criminal history as they laid out in their brief to prove his  
17 propensity to commit violence. Under Rule 404, that's not  
18 allowed under the rules of evidence and we don't think that  
19 should be allowed here.

20           THE COURT: Do you want to be heard on that,  
21 Mr. Stein?

22           MR. STEIN: No, Judge. I mean, it's not just --  
23 it's not just violence that he committed. He was also  
24 convicted of a number of robberies as well as violent acts.

25           THE COURT: Including this one. He's being



1 convicted of this offense.

2 MR. STEIN: Judge, the other part is -- I don't know  
3 if Mr. Siegel is going to proceed further with Scott Brack,  
4 but the other part of this was, unlike our client who was  
5 employed and had literally money in the bank, Scott Brack was  
6 unemployed and was in debt, so we wanted to be able to  
7 introduce that to show that he had a motive to commit robbery,  
8 unlike our client.

9 THE COURT: Well, it backs up into the issue of  
10 Mr. Brack's plea. Mr. Brack has admitted committing --

11 MR. STEIN: I understand that, Judge, but we wanted  
12 to be in a position where we could make a --

13 THE COURT: If that comes in, then this is  
14 cumulative and serves no purpose. If the idea is to offer  
15 proof that he had a reason to commit a crime, when he's  
16 admitted that he did commit the crime, we are not wasting any  
17 time on that proof.

18 MR. STEIN: Just briefly, Judge, we wanted to be  
19 able to contrast that with Elgin Brack who doesn't have that  
20 situation --

21 THE COURT: That's not relevant.

22 MR. STEIN: Okay.

23 MR. SIEGEL: And Your Honor may have just ruled on  
24 this, but also not relevant is any argument that Elgin Brack  
25 was a hard-working guy who has held down a job for many

1 months. To the extent they want to argue motive based upon  
2 the money he had in his bank account -- I think Your Honor has  
3 addressed that -- they would have to provide us with the  
4 actual bank statements, as well as bank statements going a few  
5 months back, to the extent that they want to prove he had a  
6 job and this is how much he was paid, that's fine, but any  
7 arguments about he was employed, he was a hard worker, he's a  
8 good guy, unlike Scott Brack.

9 THE COURT: Well, if he's taking -- in the usual  
10 fashion, to the extent he takes the stand, if he's going to  
11 take the stand, he will be permitted to ask him about those  
12 kinds of things: Where did you live? Are you married? Do  
13 you have a job?

14 MR. STEIN: Judge, we are not going to ask questions  
15 which are going to suggest in some way that he's, quote, a  
16 good guy, unquote. We are going to show that he was  
17 employed -- there's a certified record, I don't think they are  
18 disputing it, the admissibility or the relevance of it, as to  
19 motive -- lack of motive.

20 THE COURT: This is in connection with live  
21 testimony, Mr. Stein, or what?

22 MR. FARRELL: Background.

23 MR. STEIN: Well, it doesn't have to be in  
24 connection with live testimony because it's a certified record  
25 of his employment with the New York City Parks Department.

1 They also -- we are going to be including them as exhibits,  
2 but when they arrested Mr. Brack, there were a whole bunch of  
3 receipts -- pay receipts -- paycheck stubs from his job, so  
4 those are going to -- they took them from him when he was  
5 arrested, those are going to be exhibits. Again, it all has  
6 to do with motive, Judge.

7 THE COURT: What else is on the list?

8 MR. SIEGEL: In the motions, there was discussion of  
9 person A and identifying whether he was going to testify in  
10 providing his last known address; we will either include him  
11 or not include him on our witness list which we are going to  
12 be providing on Monday of next week. We have provided his  
13 last known address to Mr. Stein and Mr. Farrell as set forth  
14 in the motion.

15 One thing I do want to raise, in the event --

16 MR. STEIN: I'm sorry. I don't know if you are  
17 going off on another subject.

18 MR. SIEGEL: I'm not.

19 MR. STEIN: On that note, Judge, I don't know what  
20 was going on, maybe something just fell through the cracks,  
21 but on February 13th, we got a message from the Government  
22 saying that that night they would provide us with person A's  
23 address, so that was sometime last week. We got person A's  
24 address at 10:50 p.m. last night.

25 MR. SIEGEL: I have no excuse for that other than I

1 have been juggling a lot of balls with trial. I did tell  
2 Mr. Stein we would provide it on, I think he said the 14th; I  
3 did not provide it until the 17th. It has been now provided  
4 two weeks in advance of trial.

5 MR. STEIN: We are all working hard, but they are  
6 going to be arguing -- there's no secret, we are not dancing  
7 around here -- they are going to be arguing that this was an  
8 equally available witness so therefore we can't make an  
9 argument they didn't call him so they are hiding something or  
10 he's guilty or whatever, so this discussion is in the context  
11 of they're making a requested charge which they have done for  
12 equally available witnesses, and we are going to disagree as  
13 to whether or not that's, in fact, true.

14 MR. SIEGEL: Your Honor, just to clarify on the  
15 issue of equally available, the defendant attached exhibits to  
16 his last motion with text messages by Boogie who he says is  
17 person A. Those text messages include Boogie's phone number,  
18 so they have had that since March or April, which they could  
19 have easily used to reach out. We also provided records for  
20 where he was staying at the YMCA, which was his last, last  
21 known address. They have had this, I think, since -- at least  
22 since last year. So despite the fact that there was this  
23 three-day delay in getting them his current last known  
24 address, I don't think there is any argument that he is  
25 equally -- he's equally available or equally unavailable and

1 that they have had his phone number, assuming that this Boogie  
2 person is, in fact, person A; they had the records for the  
3 YMCA, which is where he was staying; and now, as of yesterday,  
4 they have all the information we have.

5 MR. STEIN: Judge, I believe that the YMCA address  
6 that Mr. Siegel is referring to is a homeless shelter where  
7 this person was staying temporarily. I don't know this for a  
8 fact, but it's my belief he's long gone from there.

9 One thing leads to another. I don't know whether or  
10 not they intend on introducing as an exhibit -- they haven't  
11 sent us their exhibits yet, but one of the things they  
12 produced in discovery, production number 18, was certified  
13 records which are incomplete, certified records from the YMCA  
14 to show that on certain days in late November of 2018, person  
15 A was living there and, in effect, they were trying to  
16 establish -- I think, if they are going to offer this -- an  
17 alibi to show that person A was signed-in for the night at the  
18 YMCA. I don't know whether they planned on offering this. If  
19 they do, rest assured I will be objecting on *Crawford* grounds  
20 that this is a violation of the defendant's constitutional  
21 right; they have some clerk in a YMCA shelter certifying some  
22 records that were cut off at the top that he was there at the  
23 time, but we will deal with that as it comes up.

24 MR. SIEGEL: Well, actually, Your Honor, this is the  
25 first time I have heard about this issue, so it might be good

1 to raise this earlier than at trial if this is an issue  
2 Mr. Stein wants to raise. I don't know in what way he's  
3 saying they're incomplete, I haven't seen any briefing on the  
4 *Crawford* issue. I think records created by the YMCA in the  
5 regular course of their business are not testimonial anyway,  
6 so to the extent Mr. Stein is anticipating an issue, I think  
7 we should address that before trial instead of having a  
8 prolonged sidebar or briefing while the jury is sitting and  
9 waiting.

10 MR. STEIN: Judge, they are incomplete because, on  
11 July 9th, 2019, I sent a message to the Government saying that  
12 part of the top of one of the pages, an important page, was  
13 cut off so you can't see the information. And the response  
14 from the prosecutor was, that the pages that were produced to  
15 you in discovery are the only version in the Government's  
16 possession. If we receive additional copies from the YMCA, we  
17 will produce those copies. So that's my reason for saying  
18 they're incomplete; part of the top of the page which has  
19 dates and symbols and stuff, to be able to interpret these  
20 records in some way, is cut off. So that's what I mean by  
21 incomplete. And if this record from the YMCA is going to be  
22 part of their exhibit, I don't need to busy the Court with yet  
23 more litigation, so if it's on their exhibit list, we are  
24 going to be filing an objection on *Crawford* grounds. It's a  
25 violation of the defendant's constitutional right to

1 confrontation because -- bring in the clerk, or whoever has  
2 personal knowledge of whether or not person A was there that  
3 night or not.

4 MR. SIEGEL: Like I said, Your Honor, I think the  
5 law is pretty clear that business records from a non-law  
6 enforcement agency are not -- do not raise *Crawford* issues,  
7 but Mr. Stein can -- he can submit a letter on this before  
8 trial and we can address it before trial and Your Honor can  
9 resolve it.

10 On person A, I want to flag the issue, in the event  
11 that the Government does not call person A, and in any event  
12 that the defendant intends to call person A, as they've eluded  
13 to, I think it would be appropriate for the Court to briefly  
14 examine him outside the presence of the jury to determine if  
15 he's just going to plead the Fifth. If person A is just going  
16 to plead the Fifth Amendment, there is a great deal of case  
17 law that I can cite that it's appropriate for the Court to  
18 determine that beforehand, and if he's just going to plead the  
19 Fifth to not have him do that in front of the jury.

20 MR. STEIN: I don't know if that's correct or not,  
21 but we'll see, I guess, when we get to that point. That will  
22 be interesting, though, if he does, if nothing else.

23 MR. SIEGEL: Just to make sure, there is -- just to  
24 start, there's the ABA Standards for Criminal Justice,  
25 Section 4-7.7, which says that defense counsel should not call

1 a witness in the presence of the jury when counsel knows the  
2 witness will claim a valid privilege not to testify. If  
3 defense counsel is unsure whether a particular witness will  
4 claim a privilege not to testify, counsel should alert the  
5 Court and the prosecutor in advance, and outside the presence  
6 of the jury, so that exactly that kind of inquiry can be made.

7 There's a 1999 Eastern District case by then  
8 District Court Judge Reena Raggi, which is *Hernandez vs.*  
9 *Senkowski*, S-E-N-K-O-W-S-K-I, and that's 1999 WL 1495443.

10 MR. STEIN: Hernandez versus what?

11 MR. SIEGEL: Senkowski, S-E-N-K-O-W-S-K-I.

12 And at page star 14, Judge Raggi rejected as  
13 meritless any claim that Hernandez, who is the defendant  
14 there, was entitled to have the witness invoke the Fifth  
15 Amendment before the jury.

16 There is similarly a 2005 Second Circuit case,  
17 *Greiner v. Wells*, G-R-E-I-N-E-R v. Wells, W-E-L-L-S, which is  
18 417 F.3d 305, 2005, which rejected a claim that a court should  
19 have allowed a defendant to call a witness in front of the  
20 jury to invoke the Fifth Amendment and noted that the Court,  
21 by excluding that evidence -- or, excuse me -- this was an  
22 ineffective assistance of counsel claim, so the attorney, by  
23 refusing to call the witness in order for him to invoke the  
24 Fifth, acted consistently with the norms of practice reflected  
25 in the ABA standards and with well established New York law in



1 refusing to call him to the stand.

2 So, according to those cases and others, to the  
3 extent person A intends to plead the Fifth, the Court should  
4 determine that outside the presence of the jury, and if that's  
5 what he's going to do, he should just not be called at all.

6 MR. STEIN: Maybe the Government can cut down on  
7 some of the guesswork and tell us whether or not -- if they've  
8 spoken to this person, whether he intends on invoking his  
9 Fifth Amendment privilege.

10 MR. SIEGEL: The first step is the Government --

11 THE COURT: Maybe by after Monday, the 24th, we will  
12 find out.

13 MR. SIEGEL: I think that's right.

14 THE COURT: Stay tuned.

15 MR. STEIN: Always.

16 MR. SELDEN: I think that's everything the  
17 Government wants to be heard on.

18 THE COURT: Mr. Stein, do you have more?

19 MR. STEIN: No.

20 THE COURT: All right. Let's check with  
21 Mr. LoMonaco and see if he has any inquiry.

22 MR. STEIN: Judge, Mr. Brack wanted to address the  
23 Court when it's convenient.

24 THE COURT: Mr. LoMonaco says you've covered too  
25 much.

1 Mr. Brack wants to address the Court?

2 THE DEFENDANT: All right, so just let me know if  
3 you can't hear something I say. I want you to get word for  
4 word what I say.

5 All right, so I don't know what's going on here, but  
6 I feel like my due process and my speedy trial, my fair -- my  
7 right to a fair and speedy trial is being violated. The lady  
8 that's reporting this, you look at the transcripts or whatever  
9 she puts out afterwards, you will see that the prosecutor just  
10 lied more than three times today. And I haven't been getting  
11 my discovery, so I haven't, like -- like, that's not fair. I  
12 can't look at discovery on time. You get in court lying to  
13 the judge about motions, like, come on. Like, this is not  
14 fair, and we all know this is not fair and I know I'm not the  
15 only one paying attention, so I think something needs to be  
16 done.

17 Like, that's just what I want to make word for word.  
18 I hope you could please put that down. Thank you.

19 THE COURT: Your words are on the record.

20 THE DEFENDANT: Thank you.

21 THE COURT: Anything further?

22 MR. SELDEN: Not on behalf of the Government, thank  
23 you, Your Honor.

24 MR. STEIN: Judge, just on logistics? So, assuming  
25 we finish on March 2nd, jury selection, are we going to come

1     forthwith to the courtroom or will we await instructions?

2             THE COURT: As I say, I generally am guided by  
3     counsel. Of late, counsel -- most counsel, both in civil and  
4     criminal cases, seem to want to start on a fresh day, even if  
5     the jury selection is fairly quick. Obviously, if the jury  
6     selection drags into the post lunchtime, then we definitely  
7     will start on the next day, so I'm guided by what counsels'  
8     wishes may be.

9             Do you have a preference, Mr. Stein?

10            MR. STEIN: I probably would like to start the next  
11     day because jury selection can be pretty intense.

12            THE COURT: Yes, and I agree. As I said, most  
13     counsel have opted for the fresh day start. I'm not opposed  
14     to that.

15            Mr. Selden, do you have a view?

16            MR. SELDEN: Your Honor, thank you, just two brief  
17     points for the record. The Government would like to get the  
18     trial commenced actually on the first day of jury selection,  
19     consistent with what Mr. Elgin Brack has said on the record,  
20     he would like to utilize his speedy trial rights, and any  
21     additional delay we would prefer consistent with what he has  
22     voiced and consistent with what, hopefully, would be a quick  
23     jury selection in the morning to get started with witnesses  
24     that day, in addition to openings, that would be the  
25     Government's position.

*Proceedings*

60

1 MR. STEIN: Judge, it's hard to believe that his  
2 speedy trial rights are going to be affected in any way by --

3 THE COURT: I don't think they are either, and if  
4 based on Mr. Selden's articulation of the Government's  
5 position, Mr. Stein, do you still adhere to your original  
6 request?

7 MR. STEIN: To the next day?

8 THE COURT: Yeah.

9 MR. STEIN: Yes.

10 THE COURT: Well then, that's what it will be.

11 MR. SELDEN: And fully not questioning the Court's  
12 decision and we respect that, I will note that Mr. Brack was  
13 just raising his hand. We want to just put that on the  
14 record, understanding the Court has made a ruling.

15 THE COURT: Mr. Brack, you were raising your hand?

16 THE DEFENDANT: I just wanted to make it known that  
17 the due process of fair speedy trial, that's what I was  
18 calling fair. You coming to court lying in front of the Judge  
19 and everybody, that's not fair --

20 THE COURT: I don't want to hear any more about  
21 that, mister.

22 THE DEFENDANT: I'm just being honest.

23 THE COURT: Well, you've already made your  
24 statement. I don't want to hear it repeated.

25 THE DEFENDANT: Yes, Your Honor.

1           MR. SELDEN: Your Honor, just with regards to the  
2 logistics, we understand the Court and parties should be  
3 presents at 9:30, Mondays through Thursdays.

4           Is the Court planning to sit on Fridays for this  
5 particular trial?

6           THE COURT: Generally, we do not sit on Fridays.  
7 The most notable exception to that rule is that if we have a  
8 deliberating jury, then we bring a deliberating jury back in  
9 on Friday and, as with all scheduling rules, they are all  
10 subject to change.

11          MR. SELDEN: Of course.

12          THE COURT: So it can be, given the way the flow of  
13 the trial is -- I mean, let me be blunt, have I trashed my  
14 ordinary Friday calendar to allow the trial to continue -- a  
15 trial to continue? I have. If I think the circumstances of  
16 the case warrant that, that's what we will do. So yes, we go  
17 into this assuming you are not here for trial on Friday, but  
18 I'm not giving you an ironclad "no," there's no way, no how  
19 that you won't be here.

20          MR. SELDEN: Thank you, Your Honor.

21          THE COURT: That's as fair as I can be.

22          MR. SELDEN: And I think I've misspoken and my  
23 colleague, Mr. Siegel, has corrected me in terms of my  
24 understanding. The court starts at 9:30 or ten o'clock?

25          THE COURT: It's 9:45. What we tell the jury is

1 9:45 and we try to get started at 10:00, or as close  
2 thereafter as we can. Those that have been here before know  
3 that we try to take a midmorning break and a midafternoon  
4 break, and we try to break around 1:00 and we try to break  
5 around 5:00, but all of those are clearly not set in stone.  
6 Court reporters can speak painfully to that, that sometimes we  
7 run -- if the folks are on a roll, we continue to roll, and  
8 there really is no hard and fast rule about when we end. If  
9 we can finish a witness, sometimes we'll be here for more than  
10 an hour. If we have out-of-town witnesses, we certainly try  
11 to accommodate those witnesses so that they don't have to  
12 spend a night overnight and come back the next day, and things  
13 of that nature. So we are very flexible about all the other  
14 deadlines during the day, so we are definitely not rigid about  
15 timing, but if things are going according to the blueprint,  
16 the blueprint would be midmorning, midafternoon break, one  
17 o'clock lunch, five o'clock adjourned.

18 MR. SELDEN: Thank you very much, Your Honor.

19 THE COURT: William wants to make sure that we don't  
20 have any snafu. The trial will be targeted for 9:45. Judge  
21 Orenstein will be selecting the jury at 9:30 in this  
22 courtroom, so that on that first day, it is 9:30 and it will  
23 be in this courtroom.

24 MR. SELDEN: Thank you, Your Honor.

25 MR. STEIN: Judge, since we've agreed in principle

1 to a number of stipulations, does the Government have a rough  
2 estimate as to how long they project the trial will last from  
3 their point of view?

4 THE COURT: Well, that's always a good question.

5 MR. SELDEN: Of course, Your Honor. Assuming that  
6 the stipulations are all agreed to, the Government would  
7 anticipate concluding the Government's case in chief by our  
8 second week of trial, hopefully early in the second week of  
9 trial.

10 THE COURT: Second?

11 MR. SELDEN: Yes.

12 THE COURT: That would be the week beginning  
13 March 9th?

14 MR. SELDEN: I believe so, Your Honor.

15 THE COURT: And we will go from there.

16 Anything else we need to address?

17 MR. SELDEN: Nothing further on behalf of the  
18 Government.

19 Thank you, Your Honor.

20 THE COURT: So as of right now, unless we have the  
21 need for it, if something pops up or if we need further  
22 clarification about something, then the next appearance will  
23 be before Judge Orenstein on March 2nd, correct?

24 MR. SELDEN: Yes, Your Honor.

25 MR. STEIN: Yes.

*Proceedings*

64

1 THE COURT: The time has been excluded to the  
2 beginning of trial. We will get all the matters on which  
3 we've reserved, we will get that out as quickly as we can,  
4 sometime this week and everybody will have a -- some further  
5 understanding of where we're going and how we plan to get  
6 there.

7 MR. SELDEN: Thank you, Your Honor.

8 THE COURT: Okay. Good luck to all. See you on  
9 March 3rd.

10 MR. SELDEN: Thank you, Your Honor.

11 MR. SIEGEL: Thank you.

12 (Matter concluded.)

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16 I certify that the foregoing is a correct transcript from the  
17 record of proceedings in the above-entitled matter.

18 /s/ Denise Parisi

March 5, 2019

19 \_\_\_\_\_  
DENISE PARISI

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